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# Virginia Law Register

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## THE COMMONWEALTH OF VIRGINIA *v.* JAMES A. AND PHILIP J. STROTHER.\*

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(Culpeper Circuit Court.)

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William F. Bywaters, for the killing of whom the defendants in this case were tried for their lives, was a resident of Culpeper, Virginia. At the time of the tragedy out of which this case arose, he was thirty-two years of age. Three miles from the town of Culpeper was Rotherwood, the home of the Strothers, an old and highly respected family. In the year 1904, the Strother family consisted of a father, mother, and several sons and daughters; the youngest, a daughter, Viola Strother, then a young lady about twenty years of age. Several of the older sons and daughters had married, and at that time were living away from the parental roof in homes of their own. James A. Strother, the oldest son, had been a resident of the town of Welch, West Virginia, since the year 1892. He had been mayor of the town, and at the time of the killing, was a prominent attorney and a member of the legislature in the state of his adoption. Another son, George French Strother, was also living in Welch, West Virginia, and was a prominent business man in that section of the state.

William F. Bywaters was a distant relative of the family and a frequent visitor at the Strother home, and, in fact, seems to have been looked upon very much as a member of the family and treated as a brother in the home. In the year 1904, the father died, leaving the mother, the son Philip, then about twenty-two years of age, and two unmarried daughters, one of whom was the Viola Strother herebefore mentioned, as the sole residents of the old home place. After the death of the father, Bywaters' visits became more frequent, and he soon came to be looked upon as the accepted suitor of Viola Strother. In April, 1905, the mother died, leaving Philip Strother and the two unmarried daughters to occupy the house alone. After the mother's death, Bywaters was looked upon more

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\*Note.—The case of the Commonwealth *v.* James A. and Philip J. Strother for the killing of William F. Bywaters, recently tried in the Circuit Court of Culpeper county, is one of the most celebrated and interesting to be found in the criminal annals of the Commonwealth. As the acquittal of the defendants precludes all possibility of an official report, the "Law Register" has had this account of the case prepared, to the end that a full report may be permanently preserved, readily accessible to the profession at all times.

than ever as the friend and protector of the family, frequently staying at the home over night for the protection of the daughters in the absence of the brother.

James Strother, notwithstanding he lived three hundred miles away, made a trip home at least once a month after the death of his father to see that all was going well with his mother and with the unmarried brother and sisters; and during the last illness of his mother, he made her a solemn promise that he would, as the oldest brother and head of the family, take care of his younger brother and the two unmarried daughters.

Matters continued thus until the latter part of the year 1906. No suspicion entered the mind of the brothers that their confidence in Bywaters was being betrayed, until the night of November 21, 1906, when Philip Strother, upon coming home late at night, saw Bywaters, undressed, coming out of Viola Strother's room. Upon going to Bywaters' room, he found him apparently asleep and difficult to arouse. Controlling his impulses, Philip Strother decided to say nothing to Bywaters as to what he had seen, but on the following day he wrote to his brother James to come home at once. In response to the letter, James Strother came to Culpeper, and in an interview with his sister, related the incident of Philip having seen Bywaters coming from her room, and stated his suspicions. Viola denied everything, and begged the brothers not to mention the subject to Bywaters. So strong were their suspicions, the brothers were but half convinced of the truth of their sister's protestation of innocence; nevertheless, they decided to comply with her request and say nothing to Bywaters upon the subject.

A short time previous to this incident, Miss Strother had left Culpeper on two occasions, ostensibly to visit friends in another part of the state, but in reality, as subsequently appeared, for the purpose of meeting Bywaters in the city of Washington and having a criminal operation performed upon her person. On neither occasion was the operation successful, and early in December a third trip was made under the guise of visiting friends elsewhere. By this time the suspicions of the brothers and sisters were thoroughly aroused, and Philip Strother and a married sister, Mrs. Gaines, made a visit to Washington, and made an unsuccessful effort to find their sister. On the 12th of December, his sister Viola not having returned, Philip Strother wired his brother James to come home at once. James and the other brother, French, living in Welch, W. Va., took the first train for Culpeper, arriving there on the morning of Thursday, the 13th of December. Viola arrived at home on the afternoon of the same day. The brothers decided to say nothing of their suspicions, but she broached the subject herself, as she afterwards stated, at Bywaters' instigation, and declared that although she was aware that her conduct had been suspicious, and that appearances were against her, yet she had been guilty of no improper conduct whatever.

On the following morning, Friday, Dec. 14, in a conversation with her sister, Mrs. Gaines, Viola again protested her innocence; but before the conversation had closed, she was seized with a violent hemorrhage, and was compelled to go to bed. Physicians were summoned, as was also Bywaters. The report of the physicians confirmed the truth of what the brothers and sisters had suspected, and finally Bywaters and Miss Strother, after many protestations of innocence, confessed everything. After some discussion the brothers decided that Bywaters should marry her the next day, the afternoon of Saturday, December the 15th. Bywaters argued for delay; but on Saturday, shortly after the noon hour, James and Philip Strother went with Bywaters to the clerk's office, where Bywaters procured a marriage license; it having been planned to circulate the report that Miss Strother was very ill, and that as she and Bywaters had been lovers for years, a bedside marriage had been arranged in view of the possible early death of the bride-to-be. Bywaters was permitted to go alone to his home for the purpose of obtaining some clothing, presumably a more suitable garb for the occasion; but subsequently he accompanied Philip Strother in the latter's buggy to the Strother home; while James Strother procured a plain gold wedding ring for the occasion and engaged the services of the Rev. Mr. Ware, rector of the local Episcopal church, to perform the ceremony, carrying the minister out in his buggy, it having been explained to him that Miss Strother was very ill, and hence the sudden marriage.

Arriving at the Strother home, the minister was left in a lower room, while others of the party, including Bywaters and James Strother, ascended to the room in which Miss Strother lay ill. Bywaters again argued for delay and a postponement of the marriage; but the brothers were firm in their determination to have it solemnized then and there. Finally James Strother, losing his patience, told his brother Philip to inform the minister waiting below that the marriage would be postponed, and to 'phone their brother French to come out at once. Presumably Bywaters understood this to mean that there was to be a funeral with himself as the central figure, instead of a wedding, for he immediately, according to the testimony of James Strother, threw up both hands and professed his entire willingness to have the ceremony performed at once. Thereupon, the minister was called in and the ceremony was performed with no one present save James and Philip Strother; Mrs. Gaines not arriving until after the ceremony, and French Strother having remained in the town of Culpeper. The minister, having been informed, as stated, that the suddenness of the marriage was due to the severe illness and possibly early death of the bride, departed without his suspicions having been aroused.

The first intention to reach the outside world from the Strother home after the departure of the minister was the sound of screams and pistol shots heard by the neighbors later in the evening, quickly

followed by messages to the effect that William Bywaters lay dying on the porch roof of the Strother residence, punctured by thirteen bullets fired by James and Philip Strother.

As to just what occurred subsequent to the departure of the Rev. Mr. Ware, and prior to the arrival of the first outsider upon the scene, is best told in the testimony of the principal witnesses hereafter given.

On December the 19th, the coroner's jury, after having taken the testimony of Mr. and Mrs. E. L. Gaines, the latter being a sister of the Strother boys, and of Mrs. Bywaters and several other witnesses, returned its verdict, finding simply that Bywaters came to his death from bullet wounds inflicted by James A. and Philip J. Strother, without affixing any degree to the crime.

Within an hour afterward, the testimony taken at the coroner's inquest was presented to Alden Bell, mayor of Culpeper, acting as magistrate, and the two brothers, waiving further examination, were bound over in bonds of \$5,000 each to await the action of the grand jury at the January term of the court. An indictment was duly returned, and the case was set for hearing on the 21st day of February, 1907.

Judge Daniel A. Grimsley, of the Culpeper circuit court, being a relative of Bywaters, Judge Thomas W. Harrison was designated to preside at the trial. Mr. Charles M. Waite, attorney for the Commonwealth, felt that he, too, was disqualified, and hence the interests of the Commonwealth were entrusted to Hon. John A. C. Keith, Commonwealth's Attorney for Fauquier County, with whom was Captain Micajah Woods, the veteran prosecuting attorney of Albemarle County, the latter having been employed by the family and friends of the deceased. For the defense, there appeared John L. Jeffries of Norfolk, John L. Lee of Lynchburg, and R. Walton Moore of Fairfax Courthouse.

The opening session of the trial was of brief duration. It was a foregone conclusion that a jury could not be obtained in Culpeper County owing to both the Bywaters and Strother families having so many relatives in the county. Accordingly, it was ordered that a venire of fifty talesmen be summoned from the county of Shenandoah, and the court adjourned to await their arrival upon the 25th day of February.

On February the 25th, each of the talesmen answered present to the call of his name, and the work of empaneling the jury was begun and soon completed. The first man called was Asa Sheetz. After the usual question as to his residence in the state and county, and other qualifications, he was accepted and took his place in the jury box. A. M. Bushong was next called and accepted. J. E. Bushong having formed and expressed an opinion, was ordered to stand aside. M. A. Price, a former attorney, had formed an opinion from reading the papers, but felt that such opinion could be changed by the evi-

dence. After questioning by the court and by counsel for both sides, he was sent to the box. S. B. Henkel was next accepted. Daniel Lickliter sought to be excused upon the ground that he was a commissioner of revenue and that it was the season when his duties were particularly pressing. The court held that the statutes did not exempt commissioners of revenue from jury service, and he was sent to the jury box. Frank Hockman was opposed to capital punishment, and his examination came to an abrupt end. W. E. Lautz had formed a decided opinion from reading the newspapers, but felt that it could be overcome by the evidence. James R. Baker had formed an opinion from reading the newspapers, but "guessed" he could give the defendants a fair trial. The Commonwealth objected to Mr. Baker. In response to questions put by Mr. Lee for the defense, he stated that his previously formed opinion would not prevent his giving the defendants a fair trial. Thereupon he was accepted by the defense, but was ordered by the court to stand aside for the time-being. G. H. Haun was accepted although he had formed an opinion, which, however, could be changed by the evidence. Josiah Wiseman, James O. Bott, and A. A. Stickley were accepted. W. Frank Bowman was opposed to capital punishment and was excused. S. M. Baker said he was sick, and was told to stand aside for the present. P. M. Jarrett and J. C. Townes were accepted. John W. Copps created a ripple of amusement by stating that he had never heard of the case until he was summoned to serve on the jury. He was accepted. W. E. Fleming and W. W. Byrd were accepted, completing the panel of sixteen. From this panel the defense struck the names of S. G. Henkel, G. H. Haun, A. A. Stickley, and John W. Copps.

The jury empaneled, Mr. Keith, outlining the case for the Commonwealth, stated a case of betrayal and subsequent marriage, followed by the killing, denying that there was anything in the evidence which would be adduced to show that Bywaters was attempting to desert his wife when killed, and stated that it would be shown that he was killed in the room in which he was married.

Mr. Jeffries for the defense went into the history of the case at length. He told of the intimate relations existing between Bywaters and the family of the defendants, and of their misplaced confidence in the deceased; of the refusal of Bywaters to marry Miss Strother upon being informed as to her condition, and of the operations he had induced her to undergo, and of his heartless conduct both before and after the operations. He stated that Bywaters was attempting to desert his wife when the defendants, wholly unable to maintain their self-control, inflicted the wounds of which he died.

The first witness called was Dr. E. H. Lewis, the coroner of Culpeper county. The bullet riddled coat and vest of Bywaters were placed upon a clothing store dummy and witness described at length the number and nature of the wounds found upon the body of the deceased. Witness exhibited a bullet taken from the shoulder of the

deceased; and another from the back of his head, mashed almost flat. Any one of several of the wounds would have resulted in death. Witness had gone through the pockets of the deceased and found no weapon more formidable than a pocket knife. Witness had found two spots of blood on the floor in the room in which the marriage ceremony was performed. There was no blood near the bed. Cross-examined, witness said it would have been impossible, even with the aid of a microscope, to have told where the blood on the floor originated.

R. H. Pearman, a local photographer, authenticated certain photographs he had made of the interior of the room in which the marriage ceremony was performed.

E. W. Pulliam, sheriff of the county, went to the Strother home soon after the shooting. He had obtained two pistols at the house. Cross-examined, witness said no effort was made to conceal anything or to keep him or any one else from entering the house.

Robert Johnson lived in sight of the Strother home. Witness heard shots and screams at the Strother home the night of the shooting and went out on his porch; could not tell whether more than one pistol was used, and did not see a pistol flash.

J. N. Judd, deputy sheriff, said that Philip Strother had stated in his presence the night of the shooting that he had fired thirteen times. James Strother had given witness a pistol, stating that it was one he used the night of the shooting. Cross-examined, witness had gone to the Strother home with Bywaters on several occasions. Bywaters always made himself perfectly at home. About a month previous to the shooting, witness and Bywaters had reached the Strother home late in the evening. Bywaters stabled and fed both of their horses, and seemed to know where everything was as well as a member of the family would know.

W. E. Coons, clerk of the court, testified to Bywaters and Philip Strother coming to the clerk's office on December 15th, 1906, about 1:30 P. M., to procure the marriage license. Bywaters came in alone and asked for the license. Philip Strother came in a little later, and James Strother still later. Bywaters told witness he was going to be married at four o'clock that afternoon, and invited witness to the wedding. Bywaters and the defendants had a private conversation before leaving the office.

Rev. Josiah W. Ware, rector of St. Stephen's Episcopal Church, had performed the marriage ceremony. Upon arriving at the Strother residence, he had waited in the parlor about thirty minutes. Finally Philip Strother told him everything was ready. The ceremony was according to the Episcopal ritual. A plain gold ring was used. The bride was in bed and wept during the ceremony. Bywaters had explained that Miss Strother was ill. Witness' suspicions were not aroused. The marriage fee was five dollars, paid by Bywaters in bills

and coin. Witness saw James Strother and Bywaters shake hands after the ceremony.

Lucien B. Crump, a justice of the peace and neighbor of the Strothers, had heard shots and screams at the Strother home on the night of December the 15th. About twenty minutes later, a messenger came from Philip Strother asking witness to come to the Strother home. At the Strother home, witness met Mr. Leman, James Strother, Philip Strother, and Mrs. Gaines. Philip Strother told witness that he had killed Bywaters because he had ruined his sister. James Strother stated that he had put two balls in him. Witness requested that he be told nothing about the shooting. Witness saw the body of Bywaters lying on the porch, and assisted the coroner. Cross-examined, Philip Strother told witness that Bywaters had not only ruined Viola, but had married her and then tried to desert her. Defendants made no attempt to conceal anything, but wished to tell witness more than he cared to hear.

John A. Bowersett, deputy sheriff, told of locating bullet marks in the room. In the blind of the window leading to the porch, witness saw a slat which had apparently been broken by a shot fired from within the room. Objection by the defense to this testimony, as being an expression of opinion, was subsequently withdrawn.

John G. Leman, lived about a quarter of a mile from the Strother home; heard shots and screaming on the night of the tragedy. Philip Strother came for witness a few minutes after the shooting, and witness went at once to the Strother home. Witness asked Philip Strother why he did it, to which Philip replied: "Because Bywaters seduced my sister, took her to Washington and had an abortion performed upon her, brought her home and married her, and was trying to desert her. We killed him upon the porch." Philip Strother stated that his conscience did not hurt him and that he would do the same thing again. Jim Strother told witness that he wanted it understood that he had done some of that shooting, and that Bywaters had betrayed and deserted his sister. Witness was with Bywaters as he lay dying on the porch. Bywaters said, "Mr. Leman, do something for me." Witness got some whiskey from Mrs. Gaines and gave it to the dying man. Bywaters then asked witness, "What must I do?" Witness replied, "Pray." In a minute or two thereafter Bywaters was dead. Witness then went into Mrs. Bywaters' room. In the presence of witness, Viola said to Jim Strother: "I have lied to you like a hound dog. I will tell you all now. I shall never be able to lift up my head again." James Strother, caressing his sister, had replied that he knew she had disgraced the family name, but that he would be her protector; that she could not continue to live in Culpeper. No cross-examination.

Before the next witness was called, the jury visited the scene of the shooting. Upon their return, R. M. Thompson, an undertaker, was called to the stand. Witness had gone to the Strother home at the



request of the coroner to prepare the body of Bywaters for burial. Witness remembered but little about the arrangement of the beds in Mrs. Bywaters' room. Saw no blood upon the porch; did not look for any. Saw no indication of any attempt to conceal anything.

Dr. Charles Stewart Cowie was called to the stand, and the clothing store dummy was again brought in and the coat and vest worn by Bywaters the night of the killing placed upon it. Witness had recently made experiments for the purpose of discovering how far a bullet, discharged at an object covered with cloth, would carry cloth into the wound. Counsel for the defense insisted that the prosecution disclose what it sought to prove by witness' testimony. The prosecution explained that one of the bullets fired at deceased had entered his coat on the shoulder, ranged between the outer cloth and the padding, and then entered the head behind the left ear. The coroner had taken from this wound the ball and shreds of the cloth of the coat. The prosecution proposed to show that a bullet passing through the cloth of the coat would not have carried shreds of the cloth into the wound unless the coat had been held directly against the head. Counsel for the defense objected that the fact sought to be established was not material, and inquired who held the coat in that position, to which the prosecution replied that that was a fact to be disclosed. Subsequently the defense withdrew its objection, and witness stated that his experiments had convinced him that the shreds of cloth would not have been carried into the wound, unless the coat had been held directly against the point at which the bullet entered. Cross-examined, witness admitted that he had made two experiments only.

This closed the case for the Commonwealth, the prosecution declining to put Mrs. Bywaters on the stand notwithstanding they had summoned her as a witness, assigning as a reason for their action that the defense had refused to permit the prosecution to examine Mrs. Bywaters beforehand, except in the presence of some female member of her family, and that they did not think it fair to the prosecution to be compelled to examine their witness in the presence of a partisan for the defense.

The prosecution having declined to put Mrs. Bywaters, widow of the deceased, upon the stand, she was called as the first witness for the defense. She testified that she was twenty-three years of age. At the age of sixteen, she went to the Episcopal Institute for Young Ladies at Winchester, and attended two years; had not attended anywhere since. Witness had known deceased since she was a girl in short dresses. Deceased came to the house often; was treated like a brother, and witness grew up to be so treated by him. Witness' father died in 1904. After that, witness lived in the house with her mother, "sister Bess," and brother Philip. After the death of witness' father, deceased came oftener, and became more affectionate in his manner, and made love to her. Witness was the baby girl of

the family, and her brothers had always been kind and lovely to her. Improper relations between witness and Bywaters began in December, 1904, a few months after the death of her father and shortly before the death of her mother. Witness' mother died in April, 1903. In September, 1906, witness discovered that she was in a delicate condition through her relations with Bywaters. She informed Bywaters of this fact, but he thought she must be mistaken. When convinced of its truth, he suggested a criminal operation. Witness rebelled; she thought that he should marry her and protect her, as her brothers would do. Bywaters refused to marry, and insisted upon an operation. Witness made three trips to Washington, Bywaters preceding her each time to avoid suspicion. In Washington, witness and deceased went to the office of Dr. Leon, who attempted a criminal operation. Dr. Leon was very brutal in his treatment, but assured her that there would be results within forty-eight hours. Results did not follow. Witness and Bywaters made a second trip to Washington and visited Dr. Waters, who refused to operate, and advised marriage. Witness recalled the occurrence after her return home from this second trip that caused her brother Philip to suspect something wrong. Jim came home and told witness of Philip having seen Bywaters cross the upper hall, going from her room at night. Jim intimated that he was going to speak to Bywaters, but witness asked him not to do so. Witness wished to shield him. Bywaters had acted improperly with her on that night. He afterwards wrote witness a letter concerning the incident, which letter was put in evidence. The writer stated that he was worried over the fact of Philip having seen him leaving her room, and had intended to tell him that he was looking for a glass to take a drink, and did not wish Phil to see him do it, as he did not wish to tempt him. He told witness to come to Washington and they would go to Blanch Miller's. One trip to Washington was made the day before Thanksgiving. The doctor would not work on Thanksgiving. Bywaters left witness in the hotel from Friday afternoon until Saturday night while he went to Leesburg to look after some dogs. On Monday, an operation was performed. It was unsuccessful. They went to and from the office on the street cars, witness' physical condition, as a result of the operation, being such that she could scarcely walk. In about two weeks, witness and Bywaters returned to Washington. The operation this time was far more painful and serious than the other. From the doctor's office, witness and Bywaters walked to a restaurant on the Avenue, where Bywaters left her alone for an hour and a half while he went to see about some mail. Witness was very ill while at the restaurant. Witness had told Bywaters she had rather die than have the last operation performed. The physician had stated that it would be terrible, and that he did not know what the result might be. Bywaters told the doctor to be careful, as her death might cost him his own (Bywaters') life. That was Thursday. Bywaters

left her alone in the hotel from three o'clock that afternoon until about nine o'clock Friday night. There were results from this operation Saturday night. Bywaters and a physician were present. Witness returned home the following Thursday afternoon. In accordance with the previous instigation of Bywaters, witness broached the subject of her relations with him to her brother Jim. The next morning she was taken ill with hemorrhages while talking to her sister, Mrs. Gaines. After she went to bed, Bywaters was summoned. Both denied their guilt, but finally admitted the truth. Her brother, French Strother, said he did not know that he wished Bywaters to marry her, or that he would let him marry her. After a marriage had been discussed, French wished it to take place at once. Bywaters begged for time, but left agreeing to do what her brothers thought best. Witness did not see Bywaters again until the next afternoon about five o'clock. Witness did not know that the marriage was to take place then. Bywaters argued for a time. Witness asked that the marriage be delayed. After the marriage, witness' brothers, the defendants, kissed witness and shook hands with Bywaters. Witness' sister said that they would arrange to give them money to start housekeeping. Bywaters said nothing. In about fifteen minutes, Bywaters said he would go back to town and get out announcement cards and tell his mother. Witness told Bywaters that Jim was going to town and would attend to the announcement cards. Bywaters was called to the 'phone and was gone twenty minutes. Witness sent for him to come up; she felt that if he were with her and saw her condition, he would not try to leave her. Bywaters was sitting by the bed and witness had her arms around him when Jim and Phil came in. Jim asked Bywaters whether he still intended to desert witness. Mrs. Gaines came in. Bywaters made no reply, but sprang up, dragging witness to her feet. Witness was in such terrible physical condition that she remembered nothing further as to what happened. From the time of her marriage until Bywaters sprang from her side, witness saw no indications that her brothers intended to do him harm.

Cross-examined, witness saw Dr. Waters in Washington four or five times; remembered a conversation with him about the case. Witness and Bywaters made full disclosures. Dr. Waters urged marriage upon both, and intimated that there would be trouble at home if they did not marry. Witness did not remember that she said to Dr. Waters that she was twenty-two years old and that her brothers had nothing to do with her, but she might have made such a remark. Witness told Dr. Waters that Bywaters expected to marry her sometime. Witness understood that a marriage had been agreed upon by Bywaters and her brothers, and Bywaters agreed at whatever time they thought best. Witness knew that Bywaters didn't wish to marry her, or he would have done so long ago. Witness again described the scene of Bywaters sitting with his arms around

her, of her brother Jim putting his hand upon Bywaters shoulder, and of the latter springing up with such force as to jerk witness from the bed. Jim seemed very friendly when he placed his hand upon Bywaters' shoulder. Bywaters gave witness a diamond ring after the ceremony was performed. The ring used during the ceremony was one that her brother Jim had obtained.

On re-direct examination, witness did not know where Jim got the ring. Witness testified that she was not nearly so strong at the time of the marriage as at the time of giving her testimony.

French Strother, called by the defense, lived in West Virginia. He came to Culpeper in December upon being told by his brother Jim that Viola was gone from home. He had not suspected a criminal operation. He had suspected improper relations. He suspected Bywaters because he was attentive to Viola, and because of his brother having seen Bywaters coming from her room. Bywaters seemed glad to see him the morning of December the 14th when Bywaters had been summoned to Rotherwood, but witness refused to take his hand. Bywaters laughed when witness told him his suspicions, and said it was ridiculous, and mentioned that he had been a friend of the family for so many years. Bywaters had said that he (Bywaters) had a sister, and if a man should injure her, he would kill him, and that he would be quick to resent it if any one should ill-treat Viola. Bywaters repeatedly denied that he was guilty of the ruin of Viola. Mrs. Gaines came in and said Viola was bleeding to death, and denounced Bywaters for having taken her to Washington and had a criminal operation performed. Bywaters replied, "You can't prove it." The doctors came and said Viola would probably have died within half an hour had they not arrived when they did. Bywaters said that if permitted to go to Viola he would establish his innocence. When he got into her room, he partially admitted his guilt and appealed to her to save his life. Viola and Bywaters begged witness not to kill him. Witness finally consented to a marriage, but had no faith in Bywaters and told him so; also told Viola that he had no faith in him. Witness told Bywaters that he would fix the time of the marriage. Bywaters wished to put it off as long as possible. Witness told Bywaters he would kill him if he deserted his sister after the marriage. Witness was not at the wedding; was in the town of Culpeper when it occurred. Witness and Mr. Jeffries hurried to Rotherwood as soon as they heard of the shooting, reaching there probably an hour and a quarter after the shooting. Witness had no idea a shooting would occur; they had reached a settlement in perfect good faith, and witness thought the whole thing was settled.

Mrs. Helen Strother Gaines, a sister of the defendants, was called for the defense. The last words of witness' mother to witness were to take care of Viola. The family regarded Bywaters as a member of the circle. He became Viola's accepted suitor. After the death of witness' father Bywaters frequently staid at the house at night in

the absence of male members of the family. On her last visit to Washington, Viola left Culpeper ostensibly to visit a friend in Rectortown, and later wrote a friend in Culpeper that she had gone to visit a friend in Washington, and was sick there. Witness was told that day of Philip having seen Bywaters coming from Viola's room. Her suspicions were aroused, and she made a trip to Washington to find her sister, but failed. Viola returned next day. The day following her return, witness had a conversation with her, telling her she would do anything to help her. Viola held up her hand and declared that there was nothing wrong. Immediately afterwards, Viola was seized with a hemorrhage. Witness thought death was imminent, and went down stairs to summon physicians. She met Bywaters with her brother French. Witness denounced Bywaters and refused to take his hand. Bywaters had finally admitted his guilt, but asserted that they were both to blame. Bywaters was willing to marry, but wished to postpone it until Viola was well. The following day, witness met her brother Jim on the street and he told her the wedding was to take place that night; that he was convinced that Bywaters was trying to make his escape. Witness did not arrive until after the marriage. She found Viola weeping bitterly, saying her brothers had broken her heart by compelling her to marry Bywaters. Witness went down stairs and argued with Bywaters against his returning to town that night. Bywaters just laughed at witness. Witness denounced him as the lowest dog that ever lived, and told him he had taken her sister to Washington and almost had her killed, and then would not stay with her. Bywaters laughed. Witness' husband also denounced Bywaters. Witness told James Strother he must watch Bywaters, or he would leave. James went up stairs whither Bywaters had gone. Witness and her husband followed. There were no shots fired in the room. Witness was under the impression a shot was fired down the steps, but could not say. Witness was much excited. Viola was screaming. James Strother telephoned Dr. Strother that Bywaters had been killed. Witness thought Bywaters was lying on the porch dead. Mr. Leman found that he was not dead, and carried water and whiskey to him. All that time they thought Viola was dead. A few minutes later, Mr. Leman came down and said Bywaters was dead. Witness was sure the window was up at the time of the shooting. The blinds were open and Bywaters had no difficulty in getting through. Witness and James and French had talked financial matters with Bywaters and Viola, and had agreed to raise \$2,600 for them at once. Cross-examined, witness said that, to the best of her belief, Philip fired at Bywaters down the steps when witness cried out that he was running away. In denouncing Bywaters, witness had told him that she prayed God the child might die and be spared a life with him. Witness did not see either of the brothers draw a pistol; they fired from the

room. Jim said he went down stairs. Witness did not see him go. Neither went out on the porch or roof.

Upon re-direct examination, Mrs. Gaines said that when she stated that no shots were fired in the room, she meant none was fired at Bywaters while he was in the room, but while he was on the porch roof.

French Strother, recalled, testified to having found a bullet on the landing of the back stairs claimed by the defense to have been fired by Phil Strother as Bywaters was running down the steps. A scar on the casing showed where a bullet struck.

James A. Strother, the older of the defendants, called for the defense, gave his age as thirty-seven. Witness was born and reared at Rotherwood, but had lived in Welch, W. Va., since 1892. Witness read a letter dated November 22, 1906, which he had received from Philip Strother, telling him to come home at once. Witness came to Culpeper in response to the letter. Philip Strother told him of having seen Bywaters coming out of Viola's room. Witness had a long talk with Viola in which she solemnly denied everything, and begged him not to speak to Bywaters upon the subject. Witness and his brother met Bywaters on the public road that day, and witness met him in Washington a few days later. On neither occasion was the subject mentioned. On December 12th, witness received a telegram from Philip telling him to come home at once. Witness and his brother French arrived in Culpeper the next morning, Thursday the 13th. Dr. Strother and Mrs. Gaines told him of circumstances connected with the case. Viola came home that afternoon. Witness said nothing to her of his suspicions, but she broached the subject herself, saying that it looked as though she were guilty, but that she was not. The next morning, Viola was seized with a hemorrhage. Viola continued to deny everything, and said that if Bywaters was brought to her, everything could be explained. Witness came to town for the doctor; remained in town several hours and until the doctor returned. Witness saw Dr. Strother upon the doctor's return from Rotherwood, and the doctor told him there was no doubt about the betrayal. French Strother said they had confessed everything. A marriage was agreed upon. French asked that he be permitted to arrange for the marriage, and stated that Bywaters had said he would be ready at any time. The following morning, Viola, very ill, confessed everything to witness and begged that Bywaters be permitted to marry her, insisting that he would be true to her. The three brothers and Dr. Strother decided that the marriage should take place that afternoon. Bywaters had no intimation that it was to take place at once, but readily agreed. On the way to the clerk's office, Bywaters halted and asked for a postponement. Witness followed Phil and Bywaters to the clerk's office. After the license was made out, the two brothers and Bywaters had a conference of half an hour. By-

waters urged a postponement. Witness informed him firmly, but kindly, that they were determined the marriage had to take place. Witness told Bywaters that he would give Viola \$1,900, representing her interest in the home place, and that Phil and Mrs. Gaines would contribute something. Bywaters evinced little interest in the arrangement, and continued to talk of a postponement, saying that he had just returned from Washington and that a speedy marriage would cause talk. Witness told him that it should be circulated that Viola was very ill; that the two had been in love for years, and wished to be married at once. Bywaters consented, but wished to go to his home and get some clothes. Witness was uneasy about letting him go. It was agreed that Bywaters should go with Phil in the latter's buggy, though Bywaters wished to go in his own buggy. After a wait of half an hour, witness saw Bywaters in a buggy with a negro, driving pretty fast. When Bywaters saw him, he got out and joined witness. Bywaters exhibited a diamond ring, costing \$75, he said, which he had loaned his sister, Mrs. Triplett, and asked if it would do for a wedding ring. It was decided that witness should get a plain gold ring, for which Bywaters said he would pay him. Witness got the ring, notified Mrs. Gaines whom he met on the street, and carried the minister out in his buggy. At the home, Bywaters again urged a postponement. It was plain to witness that he had been urging Viola to argue for delay. Witness would not yield. Bywaters consented, but a little later again urged a postponement. Witness finally got out of patience, and told Philip to go down stairs and tell the minister the wedding would be postponed, as his sister was too nervous to be married at that time, and then go to the 'phone and tell French to come out at once. Bywaters threw up his hands and said he was only too willing to marry Viola. Witness gave Bywaters \$3.50 to make \$10 for the minister's fee. After the ceremony, witness shook hands with Bywaters and kissed his sister, putting his cheek down against hers. After sending the minister away, witness returned and talked to Bywaters of the financial arrangements that had been planned for himself and Viola, and told him that he must take good care of her. Witness had accepted everything in good faith and had no idea of any trouble happening. Bywaters took no interest in the conversation, and was as indifferent to Viola as if she were a cast-off rag; would have paid more attention to one of his hound dogs in that condition. In about fifteen minutes Bywaters wished to go to town to see about announcement cards and tell his mother. Witness told Bywaters there was no woman on the place and that it was his duty to stay there; announcement cards could wait. It was witness' opinion that Bywaters intended to get to town and clean out of the county. Witness suggested that Philip take Bywaters to town and bring him back. Bywaters was willing to go to town, but not willing to come back. Arrangements were made to

have Phil take him to town. All went down stairs except Viola. Bywaters suggested that Mrs. Gaines, who had just arrived, could stay with Viola so that he could stay in town. Then followed the denunciation of Bywaters by Mrs. and Mr. Gaines. Bywaters applied an epithet to Mr. Gaines, and threatened to cut his throat, starting toward him. The brothers stopped him. A few minutes before, Bywaters had stated that he was going to town, and that nobody could make him come back. Viola sent for Bywaters and he went up stairs. Witness told Phil to follow and see that he did not leave. Witness soon followed. Witness found Bywaters by his wife's bed, their arms about each other. Witness laid his hand on Bywater's shoulder, and said, "What are you going to do?" Bywaters made no reply. Witness said, "I have come to tell you, you can't go; we are going to watch you." In a moment, Bywaters sprang up, jerking Viola with him, and dashed toward the stairway. Witness heard a shot. Gaines brought Bywaters back into the room; witness did not know how. Bywaters rushed for the window without stopping. Witness supposed he fired twice, but did not know. Witness thought Bywaters had gone off the porch, and rushed down stairs and into the yard and emptied his pistol toward the form on the porch roof. Phil was at the window firing and continued to fire until the form fell prone on the roof. Viola was screaming. The window was down during the ceremony, but was up during the shooting; witness did not know who raised it. As to witness' mental condition, Bywaters had heaped insult upon insult, injury upon injury, infamy upon infamy, until no power on earth could have kept witness from shooting him when he found that he was trying to desert his sister; witness was like a wild beast. Since the death of his father in 1904, witness had made the trip from Welch to Culpeper, a distance of three hundred miles, once a month, or oftener, to see how matters were with Viola and the other unmarried members of the family; he had paid grocery, drug, and dry goods bills for them. Viola was the youngest, her mother's pet, and he had promised his mother on her death bed to take care of her and the other unmarried sister and brother. After the shooting witness 'phoned the sheriff to come out, and called Dr. Chelf to see Viola.

Cross-examined, witness had gone up stairs to see what Bywaters was going to do. Witness was not drinking that evening; had taken one drink during the day; knew positively that Phil had not taken one. Witness had his pistol on his person when he went into the room; had worn it since leaving Welch for Culpeper. Witness went up stairs to make Bywaters stay, but had no idea he would try to make his escape; he did not know whether Bywaters knew they were armed. Though witness believed Bywaters intended to leave, he did not think there would be trouble. All idea of hurting Bywaters had been abandoned when he had agreed to



marry witness' sister. Witness had no fully framed intention when he went up stairs; supposed they had determined to hurt Bywaters if he attempted to desert their sister. Witness could not recall how Gaines had got Bywaters back into the room; Gaines was the larger man. Witness and Phil were around the door when Gaines and Bywaters got back up the steps. Bywaters rushed for the window, and witness and his brother involuntarily gave way. Not a shot was fired until Bywaters was on the porch. Witness did not know that any shot took effect save those fired while Bywaters was on the porch. From the yard witness saw Phil firing from the window.

Philip Strother, called for the defense, stated that he was twenty-five years of age. After the death of his father, witness, his mother, and his two sisters lived on the farm; and since the death of his mother, witness and his two sisters had continued to reside there. Bywaters had been on very intimate terms with the family, and would sometimes spend the night at the house in the absence of witness. Witness trusted him as a brother. Witness related the incident of having seen Bywaters coming from Viola's room. Witness wrote his brother Jim to come home. When Viola left home again, witness went to Washington with Mrs. Gaines to look for her. Witness left Jim and French to arrange the marriage. The brother who should first see Bywaters was to tell him it would be on the evening of December the 15th. Witness was the first to see him, and went with him to the clerk's office for the license, and later carried Bywaters to Rotherwood in witness' buggy. Witness had reached a settlement in perfect good faith. After the ceremony, he kissed Viola and broke down and cried. When Viola sent for her husband to come up stairs, witness followed. The window which had been closed during the ceremony was then raised. Witness did not know who raised it. Witness had his pistol in a holster under his coat. When Bywaters sprang down the steps, witness fired at him. Bywaters and Gaines came back into the room. Bywaters rushed for the window without halting. Witness fired. Witness may have had one foot out on the porch; he would not say. Witness did not fire after Bywaters was down. In the state of mind in which he was, witness could not help doing what he did. Witness told of Bywaters wishing to return to town after the wedding. A piece of cuff button found on the porch roof the day after the shooting was identified by witness as his own; his cuff may have struck the blind as he reached out to shoot. The other half of the button was also lost.

Cross-examined, witness said he had not looked for the other piece of the button until that morning. Witness had probably said that if Bywaters did not marry Viola he would kill him. Witness could not recall just where he was when Bywaters went to the 'phone in the hall by himself. Witness did not think Bywaters

was going to leave; he thought his presence in the room would prevent him from leaving. Witness was pretty close to the door leading to the steps when he fired the first shot. Bywaters came back with Gaines behind him; could not say whether Gaines brought him back; it was all so quick. Witness knew that he was shooting at Bywaters; that he was shooting to kill.

On re-direct examination, witness had gone at the request of Mr. Moore to look for the missing piece of button.

Dr. W. Johnson Strother, an uncle of the defendants, called for the defense, testified that his relations with them had been very close since the death of their father. Witness had talked with the defendants concerning the trouble of their sister. He and Dr. Chelf were called to see Viola the day prior to the shooting. She would not have lived half an hour had they not arrived when they did. Witness had thought that Bywaters was her honorable lover. After the conversation in his office with defendants concerning the marriage of Bywaters to Viola, witness thought everything was settled. No cross-examination.

Raleigh T. Green, called for the defense, had taken the dimensions of the room at the request of Mr. Jeffries of counsel for the defense. The window through which Bywaters tried to escape is two feet, ten and three-quarters inches wide, and when raised the open space is two feet, nine inches high.

Dr. Charles Clark, of St. Elizabeth's Hospital for the Insane at Washington, D. C., called as an expert for the defense, said that he had practiced for fourteen years, chiefly in cases of mental disorder. A lengthy hypothetical question, purporting to contain every material fact which there was any evidence to support, was read to the witness, ending with the interrogation: "Those being the facts, how would you characterize the act of homicide?"

The prosecution promptly objected to this question on several grounds: Counsel for the defense, in outlining their case to the jury, had given no intimation that a plea of insanity would be interposed. No foundation had been laid. Evidence was not admissible to establish emotional insanity unless it had been previously shown that the defendant suffered from mental derangement; and no such evidence had been adduced. Furthermore, material facts had been omitted. It was in evidence that the brothers had determined to go to any extreme to carry out their purpose of compelling Bywaters to remain with his wife, in the event that he should attempt to leave the house on the night of the marriage; and having done precisely what they had previously determined to do, their act could not be characterized as the result of sudden and irresistible impulse. Insults had been passed in the room below of which the question took no account. It made no reference to the fact that, although the brothers were powerful men, and were

standing about the door when Bywaters re-entered the room after his first effort to escape down the stairs, they made no effort to restrain him, but permitted him to rush to the window, and then fired upon him. That on the whole, the defense had as well be permitted to ask the witness to say what should be the punishment of the defendants as to ask him to characterize the act they had committed.

The defense contended that the act of the brothers, taken as a whole, could be divided into two separate and distinct parts: The first embraced all that had occurred prior to the marriage, and ended with the act of the defendants in taking Bywaters by the hand and assuring him that everything was settled and was all right; the second part of the act began when they discovered that Bywaters was attempting to desert their sister, and ended with the dethronement of their reason and loss of self-control upon the attempt of the deceased to rush from the room. James Strother had testified that he was "like a wild beast;" that he had no mind. This mental condition was the result of circumstances arising in an instant; and the facts in evidence were sufficient foundation for the admission of the question. The defense also referred to *Dejarnette's Case*, 75 Va. 867, in which they claimed the Court of Appeals sustained a plea of emotional insanity; also to the case of General Daniel Sickles, who killed Scott Key in Washington City because the latter had debauched Sickles' wife.

The court decided that the question should be gone over by counsel for both sides and some agreement reached as to its form and contents. After much consultation and argument, the question was submitted on the following morning. As propounded to the witness it read as follows:

A homicide was committed by two brothers, thirty-seven and twenty-five years old, respectively, under the following circumstances:

The deceased when killed was thirty-two years old, and was the second cousin of the man who killed him. The brothers belonged to an honored and highly respectable family. Their father died in 1904, and their mother in 1903, and on her deathbed she confided to the senior brother the care and protection of her youngest daughter, a sweet and innocent country girl, who was then about twenty-one years of age. All of the girl's brothers were devoted to her. The relations existing between herself and the two mentioned, were always affectionate, and after their mother's death were particularly tender and loving. The younger brother and the sister in question, with another unmarried sister, continued to live at the old home after the mother's death. The deceased was the cousin and intimate associate of the children, and he freely visited the home; he professed the warmest friendship for all of its inmates; he offered to stay at the house and look after the sisters when their brother was absent, and he often did so. The older brother lived three hundred miles away, but never forgetting the injunction of his dying mother, he made frequent visits to the old

home, and always responded to the request of those there, and for them, and especially for the youngest daughter, he manifested constant and solicitous affection. The deceased was regarded as the admirer and suitor of the young girl, and it was supposed that after a while they were to have been married. No suspicion that the deceased was betraying their confidence was entertained by either of the brothers until an occurrence on November 21st, 1906, made them fear that such might be the case. Their suspicions were allayed by investigation, their sister protesting her perfect innocence and begging her brothers not to humiliate her by calling on the deceased for an explanation. They were somewhat doubtful, but their anxiety to be convinced was such that they determined to make no further move. About December 14, 1906, the brothers obtained the fullest proof that the deceased had seduced their young sister a little before their mother's death; that under the family roof he had used her for his lustful purposes whenever opportunity presented; that in September, 1906, she found that she was pregnant, and then and repeatedly afterwards in vain implored him to marry her; that he declined to marry her then, but promised to do so at some indefinite time; that he persuaded her to submit to the dangerous operations to produce an abortion; that these criminal operations were performed in Washington city, where he had carried her and placed her in the midst of strangers, and were performed under circumstances of great brutality; that the deceased, while subjecting her to this awful ordeal, still refused to marry her, and was far more concerned for his own safety than for her welfare and life; that following the last operation the deceased became frightened, and against the advice of physicians put in peril the life of the girl by insisting that she return from Washington to her home, and this she did, though sick and weak and agonized in mind and body. The two brothers were terribly shocked and horrified by this revelation of the perfidy of a trusted relative and friend towards one who was very dear to them. Their first thought was to exact as a penalty the life of the seducer and abortionist, but they restrained themselves at her pleading, that they should allow a marriage to take place and save publicity and scandal. This conclusion was stated to the deceased, and he expressed his intention and willingness to marry her whenever her brothers thought best or wanted it to take place. To this course they consented. The deceased tried to have the wedding postponed, and having almost hypnotic influence over the girl, secured her co-operation in this effort. For some reason he was always averse to an immediate marriage, but the brothers resolved that it should take place the evening of December 15, 1906, which resolve they communicated to him. They suspected that the deceased might endeavor to escape, and so accompanied him to the clerk's office, where the license was issued, but permitted him to go home alone for the purpose of dressing for the occasion, and then one of them conducted him to the house where the young girl was lying desperately ill, suffering from the effects of a uterine hemorrhage which had occurred the day before. The brothers in arranging the marriage and having the ceremony performed acted in the utmost good faith towards the deceased; they were willing as far as possible to forget the dreadful wrong he had done their sister and them; they made plans to furnish the couple the means of starting their new life and to do all that was possible to insure their happiness and prosperity, and communicated their plans to the deceased; they had abandoned any thought of harming the deceased, and at the conclusion of the

marriage ceremony they shook hands with him, addressing him by his first name, and they then lovingly kissed their sister. Soon thereafter the deceased placed upon her hand the diamond ring which he had brought her. The ceremony was hardly over when the deceased began to show a callous indifference towards his wife and a disinclination to remain with her. It was then night and there was no woman to stay with her, and she was suffering in such manner that a husband's attention was imperatively needed. She asked him to remain, and her brothers insisted; he assigned various reasons for going from the home to the county town, four miles distant, where he lived with his mother.

The brothers were led to believe from his conduct that he did not intend to remain and would leave unless watched, but they had no belief that while being watched he would attempt to escape, and therefore anticipated no serious trouble of any kind. They feared that his ultimate intention was to cast off his stricken wife, but they had no purpose to punish him simply because there might be such an intention in his mind. While she was in Washington, very ill, he had left the young girl alone from 3 o'clock Thursday until 10 o'clock Friday night, returning before the operation resulted in an abortion, to go and see about his dogs, and his actions subsequent to the marriage impressed them with the fear that he might thereafter treat his wife with less consideration than he would accord one of them. They admonished him of his promises and his duty; they assured him that if he really wished to go to town with the purpose of returning, one of them would drive him in and bring him back, but this suggestion did not meet his approval. While the two brothers were downstairs they and their married sister concluded that there was danger of his leaving, and that he ought not to be permitted to do so. At the instance of the elder the younger went up to their sister's bedroom, where the deceased had gone a minute before, to let him see that he was being watched, and upon arriving found the window leading to the shed raised, and he believed that the deceased had raised it. In a few moments the elder brother followed the younger brother to his sister's room. Thus the two brothers were in the wife's room, where she was in bed extremely ill. The deceased sat in a chair beside the bed, her arms about his neck. The older brother placed his hand on the shoulder of the deceased, and in a not unkindly manner and tone asked him what he was going to do. There was no reply. He then said to him, "You must not leave here to-night, and we are going to watch you." At that moment there came into the room the married sister of the brothers (who was about to leave the house for her own home), and as she entered, the deceased, plainly intending to escape, arose, jerked himself away from his wife with such force as to drag her from the bed, and swiftly darted through the doorway to a landing, from which a narrow stairway runs at right angles. The brothers realized that the deceased was escaping, and immediately the younger brother fired at him, but did not injure him. In an instant the deceased was pushed or brought back into the room by the husband of the married sister, whom the deceased had encountered, and at once the deceased darted to an open window in the bedroom and proceeded to go through it. The window gave access to an upper and lower roof, affording easy means of reaching the ground. The night was dark. As the deceased swiftly went out of the window both brothers fired at him. The older brother ran downstairs and fired from the ground to the upper roof, where he thought he detected the deceased in a crouching position as if

to spring. The younger brother fired from the window. The firing ceased, when there was a sound, indicating that the man had fallen on the upper roof, and on that roof he was a little later found by a third person, mortally wounded. The time from the flight of the deceased toward the stairway until the firing ceased was a few seconds, and at most did not exceed forty-five seconds. No word was spoken while the tragedy was being enacted except that the married sister exclaimed, "Boys, he has gone," as he fled through the door and the newly-married wife screamed. The brothers were armed, but not for the purpose, or with the slightest idea of injuring the deceased that night or thereafter. Their uncontradicted statement, made under oath, was that they were overcome by the emotions which his flight inspired; that they were thrown into a frenzy and were beyond self control; nothing but some invincible physical obstruction could have prevented their action; that they had no mind left and could not help what they did.

Shortly after the tragedy the older brother 'phoned to his uncle and told him that he had killed the deceased and asked him to send the sheriff out, and the younger brother ran to the house of a neighbor and told him of the occurrence and asked him to come over, and stated that he had no regrets.

How would you characterize the mental condition of the brothers at the time they committed the homicide?

The witness replied: "In my opinion the act was an irresistible impulse, and can also be designated as impulsive insanity." Witness said there was no rigid test of insanity; that the principal cause of mental derangement is stress; and that mental derangement might occur without previous mental disease.

Cross-examined, witness said the act of the defendants could be divided into two parts, the first embracing all that occurred prior to the marriage, and the second beginning when they thought their sister was being deserted; that the emotions under which the defendants were laboring overwhelmed their intellectual processes. Witness said that if, after the marriage, the defendants discussed what they should do in the event Bywaters should show a disposition to leave, and determined to go to any length to keep him there by force, and afterwards did exactly what they had determined to do, the act would be one of deliberation. Accumulated provocative causes might produce emotional insanity. Any individual under sufficient stress will lose his control and cease to be responsible for his acts. Stampedes following the cry of fire in churches and theatres had been known to cause emotional insanity. Witness had read accounts of the first battle of Manassas, but merely smiled in reply to the question whether he thought emotional insanity or irresistible impulse caused the Federal army to stampede on that day. Counsel for the prosecution assumed the smile to be equivalent to an affirmative reply, and stated that he was glad to have the incident explained, as he had never quite understood it before. Further questions and answers brought out nothing material. This closed the testimony for the defense.

In rebuttal, the prosecution called Dr. W. F. Drewry of the Cen-

tral State Hospital for the Insane at Petersburg. Witness was forty-six years of age; had been connected with the Central State Hospital for twenty years, and had treated about four thousand insane patients. The prosecution then submitted the hypothetical question above quoted which the defense had previously propounded to Dr. Clark.

Replying to the question, witness said: "Taking all the facts into consideration, I should say they would indicate violent anger." Further questioned as to the circumstances immediately following the marriage and resulting in the killing, witness said that they indicated, "Anger almost to the last degree." Cross-examined as to what he meant by "anger almost to the last degree," witness stated that the last degree would be that condition in which a man could not restrain his acts.

The next witness called in rebuttal was William Payne. On the afternoon of December 15th, witness had driven into town in a two-horse buggy, and had met Bywaters on the street about three o'clock in the afternoon.

"What did he do?" asked Mr. Keith.

Counsel for the defense objected; then withdrew their objection; and again interposed it when witness began a recital of what had passed between Bywaters and himself on that occasion. Captain Woods for the prosecution stated that the Commonwealth proposed to show that the defendants were mistaken in saying that Bywaters, while Phil Strother was waiting to take him to Rotherwood on the afternoon of the marriage, had been seen driving from his mother's house in a vehicle driven by a colored boy, and that when seen, Bywaters had gotten out and joined young Strother; that the prosecution would show that the witness Payne had given Bywaters a "lift," and that the latter, of his own accord, had gotten out and joined a man whom Payne did not know. The Commonwealth also proposed to show that Bywaters had stated to a number of people that he intended marrying Viola; that the couple had taken a trip sometime before the homicide, and that they had told a friend on the road that when he saw them again they would probably be married; that deceased had also told his sister, Mrs. Triplett, of his intended marriage, and of the financial arrangements that had been proposed; that the defense had introduced evidence impeaching the good faith of Bywaters in entering into the marriage and the prosecution was entitled to show that he had not acted in bad faith.

The defense said that the question was not one of good faith, but of the impression made upon the minds of the defendants. To illustrate, said Mr. Lee, A might shoot B and claim that he acted in self-defense. The defense introduces evidence to prove that threats made by B to shoot A had been communicated to A. It would be clearly incompetent for the Commonwealth to show that B had expressed his love for A.

Judge Harrison ruled that the only evidence admissible was such as tended to show the mental attitude of the defendants on the day of the shooting.

Renewed argument on the admissibility of evidence showing that Bywaters was in Payne's buggy, and not his own, the afternoon of the killing, resulted in that witness being temporarily passed over.

N. S. Remsburg, called in rebuttal, testified to meeting Phil Strother on a Southern Railway train on the 12th of December. Phil Strother had testified that he had not taken a drink since August before the killing. The Commonwealth proposed to show by this witness that he had been drinking since that time. The court held the question to be immaterial; but upon the defense withdrawing its objection, witness testified that the day he met Phil Strother, the latter had requested witness not to say anything to Dr. Strother about his (Phil's) drinking; that Phil said he had taken the Keeley cure twice, and was drinking on that occasion to drown his disgust that certain legal business, concerning which he had gone to Washington, had not been settled to his satisfaction. Witness had not seen Phil take a drink on the occasion mentioned.

William Payne, recalled, gave further details as to his having picked up Bywaters on the street, and of the latter getting out of the buggy and joining a man whom witness did not know.

Reverend Mr. Ware, who had performed the marriage ceremony, re-called, had also talked with Philip Strother on the train on December 12th, but observed no signs of intoxication.

Clark, a negro employed by Bywaters, and having charge of his stable, testified that Bywaters' horse was not hitched up on the afternoon of the wedding, and that when Bywaters left at noon that day, he said he would be back that night.

The Commonwealth desired to subpoena Mr. E. L. Gaines, brother-in-law to the defendants, with the privilege of cross-examining him as a hostile witness, as the defense had not put him on the stand, and his testimony before the coroner's jury had shown him to be hostile to the Commonwealth. Counsel for the defense argued that such action should be taken only when the ends of justice so demanded, and that Gaines' testimony before the coroner had not been such as to give the Commonwealth the right to summon him as a hostile witness. The court decided that the subpoena should be issued.

Before Gaines was called to the stand, however, Judge Daniel A. Grimsley testified as to the movements of Bywaters, tracing them by means of a map. Judge Grimsley also stated that the conversation had with James Strother over the 'phone was substantially as related by that witness.

As tending to establish Bywaters' good faith, the Commonwealth proposed to prove by the evidence of Mrs. Bessie Triplett, sister of



the deceased, that he had made certain statements to her as to his intended marriage and had told her of the financial arrangements planned for himself and Viola. The defense objected, and the question was ruled out as not controverting any statement that had been put in evidence by the defense.

The testimony of Mrs. Emma Hall came within the court's ruling as to the evidence of Mrs. Triplett, and she was not produced.

E. L. Gaines, brother-in-law to the defendants, and eye witness to the homicide, was then called and examined as a hostile witness by the Commonwealth. Witness was not present at the wedding; was down stairs talking to Jim and Phil Strother after the marriage when Bywaters went up to his wife's room. Witness spoke to Bywaters about the condition of Viola. Bywaters said that he took all the blame upon himself. Phil Strother was the first to go up stairs after Bywaters had gone up. Witness might have said before the coroner's jury that Jim went up next after Bywaters. Witness pushed Bywaters back into the room when he tried to escape down the stairway. Witness did not remember his position at the time, whether he was behind or in front of Bywaters. As soon as Bywaters got inside the room he rushed for the window, and the shooting began. Witness had stated before the coroner that the window was down and that the blinds were open, but he was nervous and excited, and might have been mistaken. Down stairs, before the shooting, witness had told Bywaters that he had violated all the obligations of an Odd Fellow and a gentleman. Witness was not drunk on December the 15th, and did not attempt to buy any intoxicating liquors on that day. Objection of the defense was sustained to the question whether witness had attempted to purchase a pistol on that day; but witness had already answered that he did attempt to make such purchase.

Cross-examined by the defense, witness explained his statement before the coroner's jury, that the window was down at the time of the shooting, by saying that he was in the room some minutes before the shooting and had noticed that the window was down. Witness was sure that Bywaters had gone through the window without any hesitancy, and had so stated before the coroner's jury.

Re-examined by the Commonwealth, witness had stated before the coroner's jury that he saw Bywaters' face when the shots were fired on the porch, and may have seen it, but was confused and excited and did not distinctly remember whether he saw him or not.

Re-examined by the defense, as to a statement made before the coroner as to the cause of the killing, witness said Bywaters was attempting to desert his wife when the defendants shot him.

James Clark (colored), recalled, substantiated his previous statement that he did not drive Bywaters from his home on the afternoon of the shooting.

T. B. Clatterbuck, a farmer residing in Culpeper, contradicted the

statement made by Clark. The latter had stated in his presence that he did drive Bywaters up the street the afternoon of the shooting.

The court decided that Payne's testimony relating to Phil Strother should be stricken out; but that all evidence bearing upon James Strother be allowed to remain up to the time that he met Bywaters and they started to the clerk's office to procure the license.

The Commonwealth tendered twenty-seven instructions, and the defense, nineteen. The court gave twenty-nine instructions as follows:

#### Definitions.

1. Homicides made punishable by the laws of Virginia are divided into four classes, viz: Murder in the first degree, murder in the second degree, voluntary manslaughter, and involuntary manslaughter.

2. Murder of either degree is the unlawful killing of a human being with malice aforethought.

3. Murder in the first degree is murder by poison, lying in wait, or any other kind of willful, deliberate and premeditated killing. To constitute murder in the first degree the accused must have been incited to the killing by malice, and the killing must have been a willful, deliberate and premeditated act on the part of the accused; that is to say, he must have willed, deliberated and premeditated that he would kill the deceased or do him some serious bodily injury, the necessary result of which would be his death, and from which he died.

4. Murder in the second degree is the willful killing of a human being with malice, without provocation, or upon slight provocation, and without deliberation or a premeditated design to kill, or inflict such injuries as would necessarily cause death.

5. Voluntary manslaughter is the unlawful killing of a human being while in a transport of passion or heat of blood upon reasonable provocation and without malice, either express or implied.

6. Involuntary manslaughter is the unintentional killing of a human being without malice, while the accused was in the commission of an unlawful act, or while he was committing a lawful act in an unlawful manner.

7. To constitute a willful, deliberate and premeditated killing, it is not necessary that the intention to kill should exist any particular length of time prior to the actual killing; it is only necessary that such intention should come into existence for the first time at the time of killing or any time previously.

#### Inferences and Presumptions.

8. Every unlawful homicide in Virginia is presumed in law to be murder in the second degree. In order to elevate the offense to murder in the first degree the burden of proof is upon the Commonwealth, and to reduce the offense to manslaughter the burden of proof is upon the accused.

9. Whenever the killing is willful, deliberate and premeditated the law infers malice from this fact.

10. Malice is inferred from the fact of killing. When the killing is proved and is unaccompanied with circumstances of palliation, the burden of disproving malice is thrown upon the accused.

11. A mortal wound, given with a deadly weapon, in the previous

possession of the slayer, without any provocation, or even with slight provocation, is *prima facie* a willful, deliberate and premeditated killing, and throws upon the accused the necessity of showing extenuating circumstances.

12. The rule of law is that a man shall be taken to intend that which he does or that which is a necessary consequence of his act, but this presumption may be overcome by evidence.

13. The defendants are, in law, presumed to be innocent of the crime with which they are charged, and this presumption of innocence continues and applies at every stage of the case, until their guilt is established by evidence beyond a reasonable doubt, and that unless and until it is so established they are entitled to a verdict of acquittal.

14. The jury can not convict the defendants unless their guilt is established beyond a reasonable doubt by the evidence. Mere preponderance of proof is not sufficient, because the law in tenderness to citizens, and with deep and careful regard for their lives and liberty, gives to those who are charged with crime the benefit of every reasonable doubt. Should the jury, viewing and considering all the evidence in the case, entertain a reasonable doubt of the guilt of the defendants, there must be a verdict of acquittal.

15. Every fact, whether direct or circumstantial, essential to the establishment of the guilt of the accused, must be proven to the satisfaction of the jury beyond all reasonable doubt, and any conclusions derived therefrom must be free from such doubt. And in this connection the jury is further instructed that conjecture, speculation and theory, however plausible, ought not and must not be considered by them, and a reasonable doubt upon the whole case, or upon any material fact, entitles the accused to a verdict of not guilty.

16. Where circumstances are invoked, and to any extent relied on, to produce a conclusion of guilt, they must be of such convincing character as to exclude every hypothesis consistent with innocence. They must be so strong as to convince, to a moral certainty, and if they do not measure up to this test, they must be discarded as not warranting the conclusions sought to be produced and maintained.

17. In considering the case the jury are not to go beyond the evidence to hunt up doubts; nor must they entertain such doubts as are merely chimerical or conjectural. Doubt to justify an acquittal must be a reasonable doubt, and it must arise from a candid and impartial investigation of all the evidence in the case, and unless it is such that, were the same kind of doubt interposed into the graver transactions of life, it would cause a reasonable and prudent man to hesitate and pause, it is insufficient to authorize a verdict of not guilty. If, after considering all the evidence, you can say that you have an abiding conviction of the truth of the charge, you are satisfied beyond a reasonable doubt.

18. These instructions on reasonable doubt are not to be applied to the defense of insanity. Every man is presumed sane and mentally responsible for his acts, and the burden is on a defendant to show that at the time of the commission of the homicide he was not sane as defined in subsequent instructions, and this he must prove to the satisfaction of the jury. It is not sufficient to raise a reasonable doubt as to the sanity of the defendant.

#### Insanity.

19. The term "insanity" as used in these instructions is that condition of the mind which renders the person irresponsible for crime.

20. An accused is responsible for crime if he understands the nature and character of his act and its consequences, and has a knowledge that it is wrong and criminal and a mental power sufficient to apply that knowledge to his own case, and to know that if he does the act he will do wrong and receive punishment, and possesses withal a will sufficient to restrain his impulses, arising from mental derangement.

21. Antecedent and subsequent conditions of the mind are indicative of the condition of the mind at the time of the act, but they are not conclusive. The subject of inquiry must always be: "What was the condition of the mind at the time of the act?" And this is to be determined from all the facts and circumstances of the case. If, at the time of the act, a person is insane, as defined in these instructions, he is entitled to be acquitted.

22. Ungovernable passion, arising from a reasonable provocation, will reduce the grade of the offense from murder to manslaughter, but will not excuse the crime. Passion and provocation, however, must both coexist.

23. The jury must not allow any possible prejudice against the defense of insanity to influence them in considering whether the homicide was committed in and as a result of that condition. The law of Virginia guarantees to a defendant an absolute and valuable right to make and have that defense considered along with any other defense he may think proper to make, and if that defense is made out as required by law, the defendant is entitled to a verdict of acquittal.

24. The defendants being charged with crime are entitled to take advantage of all the principles of law and rules of practice designed to safeguard the lives and liberties of men, and therefore the jury must not regard as in the slightest degree prejudicial to the defendants the fact that their counsel have from time to time entered objection and asked for consideration of certain matters out of the presence of the jury. Such a fact is of absolutely no importance and must have no place or thought in the consideration of this case.

25. If the jury believe from the evidence that stress or strain upon the mind of the defendants at the time of the commission of the homicide, arising out of the conduct of Bywaters, the deceased, and all of the other facts and circumstances of the case so operated upon the mind of the defendant as that his reason was dethroned and his mind so impaired as that he became temporarily insane as defined in these instructions, and that he was thereby rendered incapable of governing himself in reference to said Bywaters, the jury should find a verdict of acquittal.

#### Miscellaneous Instructions.

26. Although the jury may believe that the defendant received great and gross provocation from Bywaters, the deceased, yet, if he willfully and deliberately and premeditatedly of his malice aforethought killed the said Bywaters, he is guilty of murder in the first degree.

27. If the jury believe from the evidence that in his state of mind at the time of the killing the accused might reasonably infer from the acts and conduct of the deceased immediately preceding the killing, that he intended to desert his wife, and that he made an effort to do so, and that such effort would naturally and reasonably incite in his mind great anger and passion, under all the facts and circumstances of this case; such as to control his reason and will, and that under the influence of such passion and anger, and not in

pursuance of any preconceived purpose he killed the deceased, then he is guilty of manslaughter and the jury should so find.

28. The jury in determining the weight to be given the testimony of different witnesses in this case are authorized to consider the relationship of the witnesses to the parties if the same is proved, their interests, if any, in the result of this case, their temper, feeling or bias, if any has been shown, their demeanor whilst testifying, their apparent intelligence and their means of information, and to give such credit to the testimony of such witnesses as under all the circumstances such witnesses seem to be entitled to.

29. Even though the jury should believe that the witness, E. L. Gaines, may have made some statement or statements at the coroner's inquest, inconsistent with his testimony in this case, yet, nevertheless they have no right to consider such inconsistency except for the single purpose of contradicting the witness himself; such inconsistency must not be used or considered as bearing on the truthfulness of the defendant or as bearing on his guilt or innocence or in any manner whatever to the prejudice of the defendant.

Among the instructions tendered and refused were two in which the Commonwealth and the defense set forth at length their respective theories of the case both as to law and fact. These have been deemed of sufficient importance to be inserted here. They were as follows:

Tendered by the Commonwealth.

If the jury believe from the evidence, that the deceased and Viola Strother, the sister of the accused, had been for some years previous to the homicide engaged to be married, and that during said engagement sexual intercourse sprang up between them, either by mutual consent or by seductive, persuasive influence of the deceased, resulting in conception on her part, and that about the 27th day of November, 1906, the said Viola left her home in Culpeper County, at the instance of the deceased and went to the city of Washington, D. C., while there, at his instance, she submitted to a criminal operation, which resulted in an abortion, and while there the deceased treated her with indifference, cruelty and neglect, that they registered and lived together at a hotel there as man and wife; that on Thursday the 13th day of December, 1906, the said Viola and the deceased returned together to Culpeper, Va., and that she went from there to her home; that on the following day her brother French Strother charged her with having intimate relations with the deceased and she denied the same, and that in a short while thereafter she was taken with a violent hemorrhage, that the deceased arrived at the Strother home about mid-day of December 14th. and he was charged by the said French Strother with having seduced the said Viola and having had a criminal operation performed on her; that he most emphatically and solemnly denied the same and protested his innocence before heaven, that the said French Strother told the deceased that he did not believe him, but would give him the benefit of the doubt, but that he would know positively in a short while, and if he were guilty he would kill him; that in a short while thereafter the said Viola was examined by Drs. Chelf and Strother, and it was found by them that a criminal operation had been performed upon her, that the deceased was informed of that fact by the said French Strother, that he again denied it and asked for an interview with the said Viola, that the interview was granted and thereafter they both confessed the intimacy and the

criminal operation; that the deceased then plead with the said French Strother not to kill him, but to allow him to marry the said Viola and right the wrong he had done her by nursing and caring for her, at the same time avowing his love and devotion to her, and admitting that he ought to be killed for his conduct and treatment of her; that the said Viola united in the request that they be allowed to marry, and at her instance, and on account of the possible effect it would have upon her physical condition if the deceased was then killed, the said French Strother agreed that the deceased should marry the said Viola, whenever he should be called upon by her brothers so to do, but with the understanding that if he should ever desert her, he, the said French Strother, would certainly kill him, and with this understanding the deceased left the Strother home and returned to the town of Culpeper.

That in a short while thereafter or on the next day, the said French Strother communicated this agreement to his brothers, the accused, and that they assented thereto but determined that the marriage should take place on that day, Dec. 15th, '06; that in a short while thereafter it was communicated by the accused Philip Strother, to the deceased, that the marriage was to be solemnized that day, to which the deceased agreed, but on the way to the Clerk's office to obtain his license, insisted that it be postponed, but either by choice or fear of violence obtained his marriage license, and afterwards in a conversation with the accused urged various reasons why the marriage be postponed, but finally consented for the ceremony to be performed that evening, and with the accused went to the Strother home, with the understanding that he was to inform the said Viola, that the marriage would take place that evening, and tell her of the story that was to be given out to their friends as to why they were married so unexpectedly, but instead of informing her that the marriage was to take place that evening and reconciling her to it, induced the said Viola to unite with him in a request for the postponement of the marriage, that she did unite with him in such a request, but at the demand or upon the urgent request of the accused, or under intimated threats of violence from them, the deceased agreed to the marriage, which was then solemnized; that after the marriage the accused and the deceased shook hands and in a short while thereafter the deceased indicated a desire to come to the town of Culpeper and the accused urged him not to do so, but finally consented that the said Philip Strother would bring him to Culpeper if he would return that night, to which the deceased made no reply; that while the accused and the deceased were talking about his coming to Culpeper, Mr. and Mrs. Gaines came into the room in which they were, and the deceased suggested that Mrs. Gaines could remain there and nurse the said Viola that night, as he wanted to come to town to see his mother and get out some announcement cards, to which the accused and Mr. and Mrs. Gaines objected, thereupon some angry words were exchanged between Mr. and Mrs. Gaines and the deceased, at which time the deceased used profane and insulting language towards Mr. Gaines and threatened to cut him with a knife; that the accused quieted this disturbance, and the deceased upon the call of his wife went up to her room.

And if the jury further believe that after the deceased left said room and went to the room of his wife, that the accused deliberately determined to take his life, if he attempted to leave the house that night, and that the said Jas. A. Strother sent the said Philip Strother up stairs to watch the deceased, to see that he did not leave the house, and in a short while thereafter, went into said room and placing his hand on the shoulder of the deceased demanded to know

of him "What he intended to do" and that the deceased then attempted to leave said room with the intention of leaving said house and come to Culpeper, and the accused in pursuance of a previously formed design then took his life, they are guilty of a willful, deliberate and premeditated murder and the jury must so find.

Tendered by the Defense.

The court instructs the jury that if they believe from the evidence that the deceased, William F. Bywaters, by reason of his relationship to the family of the accused, was received into the household of the accused upon the terms of utmost intimacy, and that the accused reposed in him, the said Bywaters, such implicit confidence that they frequently left their sister, Miss Viola, alone in the house with said Bywaters at night and under his care and protection, and that the said Bywaters took advantage of and abused the great trust and confidence so reposed in him by the accused to seduce and debauch their said sister, and did seduce and debauch her; and that later, she having become pregnant, he, the said Bywaters, caused and procured to be performed upon the said sister of the accused, three dangerous criminal operations intended to, and which did produce and bring about an abortion and miscarriage rendering her dangerously ill and imperiling her life, and if the jury further believe from the evidence that the facts as above set forth came to the knowledge of the accused, that acting upon said facts, they sought to bring about a marriage between the said Bywaters and their sister, that under the compulsion and with evident reluctance the said Bywaters entered into said marriage, and that immediately thereafter, against the protest of the accused, and in utter disregard of the prayers and supplications of his wife, who was then in such physical condition that it was uncertain whether she would live or die, he, the said Bywaters, cruelly and with utter lack of consideration for the welfare of his said wife, and the affectionate concern of her brothers, the accused, undertook and attempted to leave and abandon her, and if the jury further believe from the evidence that the seduction and defilement of the sister of the accused by the said Bywaters, the performance upon her, at his instance, of the dangerous and criminal operations aforesaid, the wrecking of her health, the reluctance of her seducer to make reparation by marriage, coupled with his cruel lack of all consideration for her welfare, after the marriage, and his attempt to desert and abandon her in the enfeebled and dangerous physical condition so operated upon the minds of the accused as that their reason was dethroned and their minds so impaired that they were thereby rendered and became mentally incapable of governing themselves in reference to said Bywaters, they are not guilty of any offense and the jury should find a verdict of acquittal.

Lack of space absolutely forbids any summary of the arguments addressed to the jury. The speaking began at 2:30 o'clock in the afternoon, and closed at 10:30 o'clock on the night of the following day with a five-hour address by Captain Micajah Woods for the Commonwealth. Counsel engaged were the peers of any in the Commonwealth, and each address was up to the highest standard.

The case went to the jury at 9:40 o'clock on the morning of March 7th. At 11:10 o'clock, just one and one-half hours from the time of retirement, the jury returned, and, in response to the query, "Gentlemen of the jury, have you agreed upon a verdict?" Mr. M. A.

Price, who had been chosen as foreman, promptly responded, "We have," and handed an envelope to the clerk. The clerk, Mr. W. E. Coons, opened and read: "We, the jury, find the defendants not guilty." A faint cheer was quickly suppressed by the court and the sheriff. Judge Harrison then addressed the jury in the following language:\*

"Gentlemen of the jury, you have now for nearly two weeks been away from your homes and your daily avocations in obedience to the disagreeable duty which your State has imposed upon you. You have borne every attendant discomfort with patience and without complaint, and your conduct, in court and out, has been up to the highest standard of excellence. I have been proud of the fact that you have come from a county in my circuit.

"In regard to the law that I have given you for your guidance, I have taken the instruction most likely to give rise to debate, word for word from an instruction which our highest court sanctioned.

"Your verdict, too, gentlemen, has followed the precedent of American juries generally, so far as they have come under my observation. Law books may lay down correct doctrines, but American juries will not punish a man who kills another, if that other, by aggravating and damnable treachery, invades the sanctity of his home circle and destroys its peace.

"You have listened to this evidence with scrupulous care; you have been assisted by able and eloquent representatives of the Commonwealth and defense to reach a righteous verdict. I know you to be men of high character and high purpose, and the verdict is in accordance with the dictates of your conscience. This is all; the court is satisfied.

"I hope you will have a pleasant return to your homes and find all well."

Much interest had been felt as to what a Virginia judge and jury would do with a plea of emotional insanity squarely presented for the first time. A somewhat similar plea had been upheld by the Court of Appeals in *Dejarnette's Case*, 75 Va. 867; but in that case the hypothetical question propounded and sustained was based upon an inherited predisposition to insanity. And although the Court of Appeals held, in *Dejarnette's Case*, that a reasonable latitude should be allowed in the examination of witnesses, however false or unfounded the court might consider the defense, yet numerous questions, covering the whole field of insanity, were held to have been properly excluded as having been asked for the sole purpose of misleading and confusing the jury. There is little doubt that, with possibly one or two exceptions, the plea of emotional insanity, interposed by the defendant Strothers, had no weight whatever with the jurors, and that the acquittal was based solely upon the unwritten law, which has prevailed in every Southern state since the memory of man runneth not to contrary, that the despoiler of a woman's virtue shall atone for his crime at the muzzle of a double-barrelled shot gun.

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\*Concerning the accuracy of the language here given, see the published letter of Judge Harrison, post p. 1052.